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In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROADWAY EXPRESS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Board properly concluded, with respect to two separate incidents involving two different employees, that, in each case, the individual employee's honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity within the meaning of Section 7 of the National Labor Relations Act, 29 U.S.C. 157.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 700 F.2d 687. The decision and order of the National Labor Relations Board (App. C, *infra*, 19a-52a) are reported at 257 N.L.R.B. 1197.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 16a) was entered on March 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

> concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), provides in pertinent part:

> It shall be an unfair labor practice for an employer
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title * * *.

STATEMENT

1. Respondent is engaged in the interstate transportation of freight and operates a terminal in Atlanta, Georgia (App. C, *infra*, 21a). Respondent and Local Union No. 728 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) have been parties at all material times to collective bargaining agreements covering respondent's over-the-road and local freight forwarding, pickup, and delivery employees (*ibid.*).

a. Albert T. Wilson is a dockworker and driver employed by respondent at its Atlanta, Georgia facility (App. A, *infra*, 2a). In early September, 1979, Wilson's supervisor mistakenly issued Wilson a warning letter regarding alleged mishandling of freight (*ibid.*). Although the erroneous warning letter did not result in any loss of pay to Wilson, under respondent's established policy, a second letter for the same offense could have resulted in discharge (App. C, *infra*, 22a). Wilson was, therefore, anxious to have the letter expunged from his files promptly.[1]

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[1] Under the parties' collective bargaining agreements, an employee may appeal a warning letter within 10 working days (App. A, *infra*, 2a n.1). Article 45, Section 1 of the *Southern Conference Area Over-the-Road Motor Freight Supplemental Agreement* 119-120 (Apr. 1, 1979 to Mar. 31, 1982) (GCX 4) (hereinafter "*Supplemental Agreement*") provides in pertinent

On September 5, 1979, Wilson showed the warning letter to assistant terminal manager Sammy Harmon, who agreed to investigate the matter. The next day Wilson asked Harmon whether the letter had been expunged and Harmon responded vaguely either that he had taken care of it or that he would (App. C, *infra*, 25a). Unsatisfied with this response, Wilson contacted union steward John Ellis and, on September 7, Wilson and Ellis asked superintendent Al Southern for permission to examine Wilson's personnel file (*ibid.*). Although the parties' agreement authorizes the Union to examine records pertaining to a specific grievance,[2] Southern refused to allow Ellis or Wilson to examine the file and instructed them to continue checking with Harmon. Because Harmon was not at work that morning, Wilson and Ellis went to terminal manager Carlton Shepard, who instructed Southern to allow Wilson to examine his file. After Southern finally showed Wilson and Ellis the file, which revealed that the erroneous warning letter was not among the listed warning letters, Wilson was satisfied that the warning had been expunged, and he returned to work (*ibid.*).

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part: "'Appeal from discharge, suspension or warning notice within ten (10) regular working days by written notice, and decision reached within fifteen (15) days from the date of discharge, suspension or warning notice'" (App. C, *infra*, 22a). Pursuant to respondent's established policy, an employee who fails to appeal a warning letter forfeits his right to make a subsequent challenge to it, and thus respondent may later base additional disciplinary action on the unchallenged warning (App. A, *infra*, 2a n.1).

[2] Article 44, Section 4 of the *Supplemental Agreement* (at 119) states in relevant part (GCX 4):

> The Local Union, the State or Multiple State Committee or the Southern Conference Area Grievance Committee shall have the right to examine time sheets and any other records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute, or records pertaining to a specific grievance.

Later that day, Southern asked Harmon about Wilson's warning letter. Harmon told him that he had already talked to Wilson about the letter and had told Wilson that the letter had been taken care of (App. A, *infra*, 25a). Southern then went to the dock and asked Wilson whether he had been assured by Harmon that the letter had been taken care of. Wilson replied, "yes" (*ibid.*). Southern then issued Wilson another warning letter, stating that, since Harmon had taken care of the earlier erroneous letter, Wilson "wasted * * * time" for approximately "10-15 minutes" by pursuing his grievance with other management officials (*id.* at 26a).

b. William J. Howard had been employed as a driver by respondent for three years when, on November 23, 1979, he was scheduled to drive a truck from Atlanta, Georgia, to Memphis, Tennessee. Howard inspected the truck before departing, and he found that a brake shoe on one of the axles was protruding from the hub, that the shoe was loose and that air leaked from the brake system (App. A, *infra*, 26a).

The parties' collective bargaining agreements prohibit respondent from requiring drivers to operate unsafe vehicles,[3] or to violate government safety regulations.[4]

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[3] Article 16, Section 1 of the *National Master Freight Agreement* 57 (Apr. 1, 1979 to Mar. 31, 1982) (GCX 4) (hereinafter "*Master Agreement*") provides (App. C, *infra*, 21a):

> The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition, including but not limited to acknowledged overweight or not equipped with safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified.

[4] Article 16, Section 2 of the *Master Agreement* (at 57) (GCX 4); (App. C, *infra*, 22a) provides:

> Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work or danger to person or property or in violation of any applicable statute or court order, or in viola-

The agreements also require drivers to report equipment defects. Once defects are reported, respondent may not then require any employee to operate the reported vehicle until it is inspected by a mechanic.[5] Respondent, however, has established a rule under which any employee who insists that a mechanic inspect the vehicle after a garage foreman discovers no defect will be issued a warning letter for wasting time and money if the mechanic also fails to discover any defect (App. A, *infra*, 4a).

Howard reported the brake problem to garage operations manager W.E. Hartley (App. C, *infra*, 26a). Hartley checked the brakes and parking brake valve and told Howard that there was nothing wrong with either. He also warned Howard that if a mechanic were assigned to inspect the unit, Howard would probably receive a warning letter (*ibid.*). Howard insisted on an inspection and the mechanic concluded that the brakes were "alright" (*id.* at 26a-27a). Howard then received a warning letter for unnecessarily delaying freight (App. A, *infra*, 5a).

2. The Board, in agreement with its Administrative Law Judge, found that, in issuing the warning letters

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tion of a government regulation relating to safety of person or equipment.

Federal Highway Administration regulations provide in pertinent part: "No motor vehicle shall be driven unless the driver thereof shall have satisfied himself that the following parts and accessories are in good working order * * *: Service brakes, including trailer brake connections. Parking (hand) brake * * * " 49 C.F.,R. 392.7.

[5] Article 16, Section 4 and 4(a) of the *Master Agreement* (at 58) provides (App. A, *infra*, 4a).:

> Employees shall immediately, or at the end of their shift, report all defects of equipment. * * * The employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical departments.

to employees Wilson and Howard, respondent violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), because it had disciplined employees for engaging in "concerted activities" within the meaning of Section 7 of the Act, 29 U.S.C. 157, *i.e.*, seeking to enforce rights under the collective bargaining agreement (App. C, *infra*, 38a, 39a). In both instances, the Board found that the employees had acted reasonably in asserting their contract rights, and that respondent's actions had interfered with the employees' Section 7 rights (App. C, *infra*, 39a). In concluding that both employees had engaged in concerted activity, the Board relied (*id.* at 38a) upon its long-established doctrine that an individual's reasonable assertion of a right embodied in a collective bargaining agreement is concerted activity within the meaning of Section 7 of the Act. *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295, 1298 (1966), enforced, 388 F.2d 495 (2d Cir. 1967). Accord: *T&T Industries, Inc.*, 235 N.L.R.B. 517 (1978).[6]

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[6] The Board also found (App. C, *infra*, 42a) that respondent did not violate Section 8(a)(1), (3), and (4) of the Act, 29 U.S.C. 158(a)(1), (3), and (4), when it issued warning letters and suspensions to a third employee, Saint E. Bell, Jr., and subsequently discharged him. The Board concluded that Bell's conduct leading to one of the warning letters was unprotected because Bell made unprovoked, insolent remarks to the supervisor during the grievance-related discussion (App. C, *infra*, 29a, 42a); that three other warning letters were based on Bell's having taken excessive breaks and having behaved disrespectfully toward supervisors, rather than on his inclusion in the list of witnesses scheduled to testify in a Board proceeding or on any other activity protected by the Act; and that respondent's suspensions and ultimate discharge of Bell were not unlawful because they were disciplinary actions taken in response to bad faith claims of contract rights by Bell that constituted a "pattern" of "noncooperation and resistance to the instructions of his supervisors" (*id.* at 46a). Accordingly, the Board dismissed all allegations of the complaint relating to employee Bell (*id.* at 51a).

3. The court of appeals declined to enforce the Board's order with respect to employees Wilson and Howard (App. A, *infra*, 1a-16a). The court acknowledged (*id.* at 15a) that the Board "presents an attractive argument for *Interboro's* validity"; but it read the former Fifth Circuit's opinion in *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714 (1973), which it felt bound to follow, as rejecting the *Interboro* doctrine (App. A, *infra*, 14a). The court concluded (*ibid.*) that the law in the Eleventh Circuit, "until stated differently by the court sitting en banc, adheres to the definition of concerted activities announced in *Mushroom Transportation Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). That is, an individual's conduct may constitute protected concerted activity if engaged in to initiate, induce, or prepare for group action or relate to group action in the interest of other employees."[7] See *NLRB* v. *Datapoint Corp.*, 642 F.2d 123, 128 (5th Cir. 1981).

REASONS FOR GRANTING THE PETITION

On March 28, 1983, this Court granted the Board's petition in *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960; the issue in that case is identical to that presented here, viz., whether an individual employee's honest and reasonable assertion of a right that is provided for in a collective bargaining agreement is concerted activity within the meaning of Section 7 of the National Labor Relations Act, 29 U.S.C. 157.[8] Accord-

[7] The court acknowledged that *Buddies Supermarkets* was factually distinguishable since that case did not involve an employee claim under an existing collective bargaining agreement (App. A, *infra*, 14a). Nevertheless, the court read the opinion in *Buddies Supermarkets* as clearly having rejected the Board's *Interboro* doctrine.

[8] A copy of our brief in *City Disposal* is being sent to respondent.

ingly, the Court should hold this petition pending its decision in *City Disposal Systems, Inc.*[9]

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960; and then disposed of as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

JUNE 1983

[9] We, of course, do not seek review of the court of appeals' decision insofar as it upheld the Board with respect to the dismissal of allegations pertaining to employee Bell, and we have not printed in the appendix the court's separate judgment denying Bell's petition for review. Bell did not intervene in the proceeding initiated by Roadway's petition for review.

APPENDIX A

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

MARCH 17, 1983

No. 81-7831, 81-7902

ROADWAY EXPRESS, INC., PETITIONER,
CROSS-RESPONDENT,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT,
CROSS-PETITIONER

SAINT E. BELL, JR., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Before HENDERSON and HATCHETT, Circuit Judges, and TUTTLE, Senior Circuit Judge.

HATCHETT, Circuit Judge:

The National Labor Relations Board (Board) asks the court to follow *NLRB* v. *Interboro Contractor's Inc.*, 388 F.2d 495 (2d Cir.1967) and hold that an employee acting alone engages in "concerted activities" when he asserts a right created by a collective bargaining agreement. Adhering to Fifth Circuit precedent, we reject the Board's request. The Board's order is enforced in part.

I. FACTS

These cases arose when three employees filed charges with the Board alleging that Roadway Express, Inc., (Roadway) unlawfully interfered with, restrained, and coerced the exercise of rights protected

by section 7 of the National Labor Relations Act (Act), 29 U.S.C.A. § 157. Roadway allegedly interfered with the exercise of rights by issuing disciplinary warning letters to two employees and by suspending and ultimately discharging another. The administrative law judge's (ALJ) factual findings are as follows.

Albert T. Wilson

Albert T. Wilson is a dockworker employed at Roadway's Atlanta, Georgia, terminal. In early September, 1979, Wilson's supervisor mistakenly issued a warning letter to Wilson for mishandling freight. Wilson complained to the assistant terminal manager, Sammy Harmon, who agreed to investigate.[1] On September 6, 1979, when Wilson asked Harmon whether the warning letter had been expunged, Harmon told Wilson either that he had taken care of the letter or that he would take care of it. Unsatisfied with that response, Wilson contacted the union steward John Ellis. On September 7, 1979, Wilson and Ellis went to see superintendent Al Southern seeking permission to examine Wilson's personnel file. Southern refused and instructed Wilson and Ellis to continue checking with Harmon. Because Harmon was not at work that morning, Wilson and Ellis went to terminal manager Carlton Shephard who eventually instructed Southern to let Wilson examine his file. Complying with these instruc-

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[1] Roadway Express and Local #728 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers are parties to a collective bargaining agreement that authorizes employees to appeal warning letters by written notice within ten days of the warning. National Master Freight Agreement and Southern Conference Area Over-the-Road Supplemental Agreement, Art. 45, § 1. By Roadway Express's established policy, if an employee fails to appeal a warning letter, he forfeits the right to subsequently challenge the warning should the company later base additional disciplinary action on the unchallenged warning.

tions, Southern showed Wilson and Ellis a list of Wilson's current warning letters. The list did not include the erroneous letter regarding mishandling of freight. Satisfied that the erroneous letter had been expunged, Wilson returned to work.

Shortly thereafter, Southern contacted Harmon to inquire about the erroneous letter. Harmon told Southern that he informed Wilson on September 6, 1979, that the warning letter had been "taken care of." Southern then asked Wilson whether Harmon had said that he had taken care of the warning letter. Wilson replied "Yes." Southern then issued Wilson a warning letter for wasting approximately ten to fifteen minutes pursuing a grievance with management officials after being assured that it had been resolved. Wilson's charges filed with the Board resulted in the issuance of a complaint alleging that Roadway Express violated section 8(a)(1) of the Act, 29 U.S.C.A. § 158(a)(1),[2] by issuing the second warning letter.

William J. Howard

On November 23, 1979, Howard was scheduled to drive a truck from Atlanta, Georgia, to Memphis, Tennessee. After inspecting the vehicle assigned to

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[2] Section 8(a)(1) of the Act states that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed [by section 7 of the Act]." 29 U.S.C. § 158(a)(1). Section 7 provides, in pertinent part, that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment....

29 U.S.C.A. § 157.

him, Howard reported that the brake shoe on one axle protruded from the hub and when the parking brake and foot brake were applied simultaneously, air leaked from the brake system.[3] Howard reported the perceived defect to garage manager W.E. Hartley. After inspecting the vehicle, Hartley told Howard that the vehicle was safe to operate. Hartley also told Howard that if he insisted upon a mechanic's inspection and no defect was revealed, the company would enforce its policy of issuing a warning letter for unnecessarily delaying freight.[4] Howard insisted on a mechanic's inspection. The mechanic assigned by Hartley to examine the

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[3] Federal Highway Administration regulations require drivers to inspect their assigned vehicle's service brakes, including trailer brake connections. *See* 49 C.F.R. § 392.7 (1981). The collective bargaining agreement provides in part:

> [E]mployees shall immediately, or at the end of their shift, report all defects of equipment.... The employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical departments.

Art. 16, § 4.

[4] Roadway Express has an established working rule correlating to the procedures of the collective bargaining agreement set out in footnote 3. By this company rule, if a driver perceives a defect in the unit assigned to him, he takes the vehicle to the garage foreman for inspection. If the garage foreman agrees with the driver's report, a mechanic is assigned to repair the vehicle. If the garage foreman discovers no defects, he informs the driver who then can either accept the garage foreman's opinion and continue on his trip, or insist that a mechanic, a union member, inspect the vehicle. If the driver insists upon a mechanic and no defect is discovered, the driver will receive a warning letter for delaying freight and incurring unnecessary expenses. Vehicles are inspected by mechanics prior to assignment to insure roadworthiness. The ALJ found that the local union did not object to this policy, but reserved the right to consider each case on its merits in the event that enforcement resulted in a driver's suspension or discharge.

vehicle found no defects; as a result, Howard's supervisor issued a warning letter for negligence. Like Wilson, Howard's charges filed with the Board resulted in a complaint alleging that the warning letter's issuance violated section 8(a)(1) of the Act, 29 U.S.C.A. § 158(a)(1).

Saint E. Bell, Jr.

An employee with Roadway since 1962, Saint Bell worked as a forklift operator in Roadway's Atlanta terminal until his discharge on April 9, 1980. Between 1962 and 1980, Bell received over fifty warning letters for such offenses as tardiness, wasting time, insubordination, and failing to follow instructions. Characterized as an *enfant terrible* by the ALJ, Bell was also suspended during this period for failing to follow instructions. In response to numerous charges filed by Bell from October, 1979, to April, 1980, the Board issued four complaints challenging seven disciplinary measures as unfair labor practices.

1. On May 8, 1979, Bell complained to dock foreman Roy Wood that his forklift was smoking and requested another lift. After Wood told Bell to find another lift, Bell stated that it was not his responsibility to find another lift, and asked for a union steward. Wood told Bell that a steward would not be available until after lunch and instructed him to continue driving the smoking lift until the steward returned. Bell replied that he did not care whether the steward came or not, and that he would "get [Wood's] ass." Wood wrote up the incident in a warning letter for insubordination.

2. On July 26, 1979, Bell received a warning letter for taking an excessive restroom break. In a meeting with terminal manager William Young and union steward James Long, Young stated that Bell had spent thirty-two minutes in the restroom, and such an excessive break had cost the company five dollars. The ALJ

found that Roadway's employees were aware of Roadway's policy against wasting time and found it irrelevant that the policy was not so specific as to place time limits on restroom breaks.

3. Bell also claimed as an unfair labor practice Roadway's refusal to pay overtime for time spent discussing a grievance and the issuing of a warning letter for insubordination on August 28, 1979. On that date, Bell was assigned to repackage damaged freight. Upon finishing this assignment, Bell argued that, pursuant to company policy, an employee less senior than Bell should have been assigned to repackage the damaged freight. Bell requested dock foreman Wood to call a union steward. Finding none available, Wood refused Bell's request to contact a steward at home. In the course of the conversation, Bell told Wood that Wood thought he was God and Bell was going to show Wood that he was not God, and that Bell "was going to have papers for [Wood's] ass." Later that day, Bell and a union steward were called to the office of terminal manager Young. Young told Bell that he had been disrespectful to Wood and would receive a warning letter for insubordination. This discussion between Bell, the union steward, and Young lasted until shortly after 9 a.m. or one-half hour after Bell's regular shift. Contrary to a discussion held after his shift on a previous occasion, Bell did not receive overtime pay for the August 28, 1979, grievance discussion. The ALJ found that it was contrary to Roadway's policy to pay overtime while discussing grievances. Time so spent is payable only if it occurs during the employee's normal eight-hour shift.

The remaining disciplinary actions concern Bell's preoccupation with the operation of Roadway's forklifts. The forklifts are designed to move freight by positioning two blades under freight. The blades attach to a carriage and can be adjusted by the forklift operator to accommodate different loads and widths. The blades

are installed through a center opening on the carriage. Pins secure the blades in slots spaced at varying intervals along the carriage.

Bell's concern arose after the blades on a lift he was operating came out of the slots on the carriage. In his attempt to reposition the blades properly, Bell injured his fingers. After recuperating, Bell began reporting forklifts with regularity because the blades would not stay in place. Although management officials assured Bell that the lifts were safe, he continued to complain. The terminal manager, Al Harrelson, explained to Bell that, without freight, the blades on all forklifts would slide if kicked at the bottom. With freight added, however, Harrelson explained that the weight would hold the pins in position and would prevent movement of the blades. Unpersuaded, Bell maintained that the forklifts were unsafe if the blades moved whenever the pins were in place.

4. On January 2, 1980, Bell deadlined two forklifts for lack of pins and inadequate locking. The dock foreman, Rocky Allen Davis, assigned Bell to another forklift, which at the time, was operated by employee Reeves. Davis reassigned Reeves to one of the units deadlined by Bell. Bell argued with Davis for reassigning Reeves to the deadlined forklift, complaining that such action was contrary to Roadway's policy of safety environment. Bell continued by claiming that he could sue the supervisors because they were on profit sharing. When Davis told Bell to keep quiet, Bell responded that it was "just tough shit" and that he could say anything he wanted to. Citing Bell's disrespect, Davis issued a warning letter for insubordination.

5. On March 4, 1980, Bell reported that the pins on his assigned forklift did not secure the blades properly. Davis checked the forklift, found that the pins locked properly, and instructed Bell to continue transferring freight. Bell refused. The forklift was then inspected by

Harrelson who found the unit safe and instructed Bell to go to work. Assistant terminal manager Sammy Harmon arrived on the scene, explained to Bell why the forklift was safe, and told him to go to work. Bell again refused. At that point, Harmon discharged Bell.

On the following day, the forklift was inspected by a Roadway mechanic. The mechanic stated that he would not drive the forklift because the slots cradling the blades were worn and the blades were loose. In view of the mechanic's doubts as to the forklift's safety, management officials reconsidered their action and reduced the discharge to a three-day suspension for wasting time. That same day, Roadway officials called in representatives from Datsun and Clark, manufacturers of the forklifts. After initial uncertainty, the representatives concluded that Datsun and Clark blades were interchangeable on forklift cartridges and the pins which secure the blades were for the driver's convenience, and not a safety item.

6. On April 1, 1980, dock foreman Davis assigned Bell forklift #3115. Bell reported that the blades on forklift #3115 were insecure. Davis told Bell that he could either change the blades or drive another available forklift. Bell checked out another unit but instead of using it, he wrote a report on the perceived defects of unit #3115. Davis summoned Harrelson who told Bell that # 3115 was not assigned to him, that the next driver could write up any possible defects, and that he (Harrelson) would have the forklift checked out. After repeated refusals, Bell finally started to work. Later the same day, Harrelson discharged Bell for refusing to follow instructions. Roadway officials subsequently reduced the discharge to a three-day suspension because Bell had not actually refused any order and his conduct was not so egregious to warrant discharging an eighteen year employee.

7. Between March 30, 1980, and April 7, 1980, forklift #3102 was reported defective on five occasions, four times by Bell. On April 8, 1980, a mechanic inspected #3102, found that the pins held the blades securely in place, and authorized it for service. When Bell reported for work that day and was assigned #3102, he immediately wrote a report stating that the pins would not secure the blades. Dock foreman Rickey Beasley read the report and told Bell that the forklift had been examined by the garage and found safe. After conferring with terminal manager Joe Bass, who again told Bell that the garage found the forklift safe, Bell still refused to operate the lift. Beasley informed Bell that continued refusal would warrant disciplinary action. After conferring with a union steward, Bell again told Bass that the forklift was unsafe and refused to operate it. Bass then discharged Bell.

Immediately after the discharge, Bass asked another mechanic to inspect #3102 again. The mechanic operated the lift, found both pins were securing the blades, and discovered no safety defects.

II. ADMINISTRATIVE LAW JUDGE'S RULINGS

The ALJ concluded that when Wilson pursued his grievance and Howard insisted that a mechanic inspect his vehicle, they were attempting to enforce rights created by the collective bargaining agreements. Relying upon *NLRB* v. *Interboro Contractor's, Inc.*, 388 F.2d 495 (2d Cir.1967), the ALJ held that Wilson and Howard were engaged in protected concerted activities within the meaning of section 7 of the Act, 29 U.S.C.A. § 157, and that Roadway Express violated section 8(a)(1) of the Act, 29 U.S.C.A. § 158(a)(1) by issuing warning letters. The ALJ ordered Roadway Express to rescind and expunge the letters.

Regarding Bell, the ALJ determined that the General Counsel failed to establish that Roadway committed any of the unfair labor practices alleged, and recom-

mended that all complaints concerning Bell be dismissed. The ALJ found that Bell's disrespectful behavior resulting in disciplinary action for insubordination and wasting time was not protected under the Act. The ALJ further found no evidence to refute Roadway's position that it was contrary to its policy to pay overtime for time spent discussing grievances. As for the suspensions and ultimate discharge, the ALJ determined that Bell's conduct would be protected concerted activity if he in good faith refused to operate the forklifts. The ALJ concluded, however, that Bell's uncompromising and uncooperative attitude indicated a lack of good faith and not a true concern for safety.

In both cases, the Board agreed with the findings and rulings of the ALJ and adopted his recommended order.

III. DISCUSSION

In reviewing orders of the National Labor Relations Board, we are bound by the Board's factual findings if supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *Weather Tamer, Inc.* v. *NLRB*, 676 F.2d 483, 487 (11th Cir.1982). Similarly, we must accept the credibility choices of the ALJ unless his choices are self-contradictory. *NLRB* v. *Florida Medical Center, Inc.*, 576 F.2d 666, 671 (5th Cir.1978). After examining the record, we find substantial support for the Board's findings regarding Bell's warning letters for insubordination, wasting time, and for Roadway Express's refusal to pay overtime while discussing a grievance.

Bell's remarks to supervisor Wood on May 8, 1979, can be interpreted only as contemptuous behavior toward management. Courts have recognized that abusive language often accompanies grievance discussions, and, in some instances, have found such language protected under section 7. *See, e.g., Crown Central Petro-*

leum Corp. v. *NLRB*, 430 F.2d 724 (5th Cir.1980); *NLRB* v. *Thor Power Tool Co.*, 351 F.2d 584 (7th Cir.1965). These decisions are of no avail to Bell, however, because his remarks were not made in the context of grievance discussions, but were entirely unprovoked. As such, they are not protected. We agree with the Board that the May 8, 1979, warning letter did not interfere with, restrain, or coerce Bell's right to engage in concerted activity.

We also find no error in the Board's determination that Roadway did not violate sections 8(a)(1), (3) and (4) of the Act, 29 U.S.C.A. § 158(a)(1), (3), and (4)[5] by issuing warning letters to Bell on July 26, and August 28, 1979. The record contains no evidence to refute Roadway officials' testimony that a thirty-two minute break was excessive. No employer would condone such practice by his employees without some sort of reprimand. The record also fails to support the allegation that Roadway discriminated against Bell because of his union membership, or because he filed charges against Roadway, or because he was scheduled to testify at a Board hearing. Without more, these circumstances fail to support a conclusion that the warning letter of July 26, 1979, was issued for pretextual reasons.

Finally, we find no error in the Board's ruling concerning failure to pay overtime while discussing grievances. Roadway officials' unrefuted testimony indicates that it was not company policy to pay employees for time spent discussing a grievance if occurring beyond the eight-hour shift. That Roadway Express mistakenly

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[5] Section 8(a)(3) of the Act provides in part that "[i]t shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C.A. § 158(a)(3). It is also an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony . . . ." 29 U.S.C.A. § 158(a)(4).

paid Bell on a previous occasion for discussing a grievance after his regular shift does not disprove the existence of the company policy. In any event, the failure to pay overtime while discussing a grievance is no indication that Roadway sought to discriminate against Bell for filing charges with the Board.

The circumstances of Howard's and Wilson's warning letters, and the suspensions and discharge of Bell provide the setting for the parties' major disagreement in this case. In each instance of disciplinary action, Howard, Wilson, and Bell were asserting rights found in the collective bargaining agreement. The disagreement centers on whether the assertion of such rights by an individual employee constitutes concerted activity protected by section 7. According to the Board, an employee acting alone engages in concerted activities when he in good faith attempts to enforce rights created by the collective bargaining agreement.[6] *NLRB* v. *Interboro Contractor's Inc.*, 388 F.2d 495, 500 (2d Cir.1967). Under the *Interboro* doctrine, a single employee's "activities involving attempts to enforce the provisions of a collective bargaining contract may be deemed to be for concerted purposes even in the absence of such interest by fellow employees." 388 F.2d at 500.[7]

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[6] The Board seeks enforcement of Bell's discharge because of the ALJ's finding of a lack of good faith in his persistent complaints about company equipment. Roadway Express, of course, also seeks enforcement of Bell's discharge, but has intervened in his appeal because it disagrees with the Board's reasoning, i.e., that his conduct would have been protected but for his bad faith.

[7] In *Interboro*, one employee, on several occasions, asserted rights not only for himself but for other employees as well. The language from the decision quoted in the text above, however, is broad enough to cover situations where only a single employee asserts rights authorized through collective bargaining.

Roadway Express urges us to interpret "concerted activities" more literally and find that an employee's conduct can be considered concerted only where his actions initiate, induce, or prepare for group action. *See, e.g., NLRB* v. *Datapoint Corp.*, 642 F.2d 123 (5th Cir.1981); *Mushroom Transport Co.* v. *NLRB*, 330 F.2d 683 (3d Cir.1964). Because Wilson, Howard, and Bell only attempted to benefit themselves and never intended to induce or initiate group action, Roadway argues that their individual actions cannot be deemed concerted.

Despite the *Interboro* doctrine's acceptance by several circuits,[8] we are bound by the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc). That court had the opportunity to adopt the *Interboro* doctrine in *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714 (5th Cir.1973), but declined to do so. In *Buddies Supermarkets*, employee Smith was discharged for causing dissention among his co-workers after failing to gain a more favorable contract for himself. The ALJ held that the employee was discharged for engaging in section 7 protected concerted activity, and the Board affirmed. The Board sought to bring the case within the parameters of *Interboro*, reasoning that Smith was the most vocal in presenting his views to company officials and that his attempt to gain better contractual terms for himself was intended to arouse some form of group action within the meaning of *Mushroom Transportation Co.* v. *NLRB*, 330 F.2d 683 (3d Cir.1964).

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[8] *See Roadway Express, Inc.*, 217 N.L.R.B. 278 (1975), *enf'd*, 532 F.2d 751 (4th Cir.1976); *NLRB* v. *Ben Pekin Corp.*, 452 F.2d 205 (7th Cir.1971); *NLRB* v. *Selwyn Shoe Mfg. Corp.*, 428 F.2d 217 (8th Cir. 1970).

The Fifth Circuit rejected the Board's reasoning and questioned the validity of the *Interboro* doctrine. The court stated:

> We are persuaded ... that a statutory basis for the concerted activity rule announced in *Interboro* is questionable and hence we decline to follow that decision. Moreover, apart from the fact that the *Interboro* decision has not received wide acceptance, there is another reason why it does not apply in the context of this case. *Interboro* is distinguishable on its facts since Smith's activity here did not arise in the framework of an attempt to enforce an existing collective bargaining agreement. Thus, even if we were to fully agree with *Interboro*, this distinction would appear to place the instant case in the wholly different category. The essence of our holding therefore, is that regardless of our analysis of *Interboro*, the result remains the same; the Board's reliance on it for its finding of concerted activity cannot be sustained.

481 F.2d at 719 (footnote omitted).[9]

Buddies Supermarkets is distinguishable from the instant cases because no collective bargaining agreement was involved in *Buddies Supermarkets*. Nevertheless, we simply cannot ignore the decisive language used in rejecting *Interboro*. The law in this circuit, until stated differently by the court sitting en banc, adheres to the definition of concerted activities announced in *Mushroom Transportation Co.* v. *NLRB*, 330 F.2d 683, 685 (3d Cir.1964). That is, an individual's conduct may constitute protected concerted activity if engaged in to initiate, induce, or prepare for group action or relate to group action in the interest of other employees. *Ac-*

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[9] Three other circuits have specifically rejected the *Interboro* doctrine. *See Kohls* v. *NLRB*, 629 F.2d 173 (D.C.Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1390, 67 L.Ed.2d 363 (1981); *Aro, Inc.* v. *NLRB*, 596 F.2d 713 (6th Cir.1979); *NLRB* v. *Northern Metal Co.*, 440 F.2d 881 (3d Cir.1971).

cord, NLRB v. *Datapoint Corp.*, 642 F.2d 123, 128 (5th Cir.1981).[10]

The Board presents an attractive argument for *Interboro*'s validity. According to the Board, the collective bargaining process is the quintessence of concerted activity and the enforcement of a collective bargaining right by an employee is a natural continuation of that process. Because collective bargaining is concerted activity, the assertion of a contract right should also be viewed as concerted activity. Furthermore, the action taken by the employer when an employee asserts contract rights will, more often then not, affect other employees. It matters little whether the employee's activity helps other employees; the effect in most instances is felt by others.

If it were not for *Buddies Supermarkets* and *Datapoint*, we might be persuaded by the Board's argument. Until this court sitting en banc directs otherwise, however, we shall follow the language of those decisions. That is not to say that employees Howard and Wilson are without remedy in challenging their warning letters. Both can pursue their contractual claims through their bargaining agent under the grievance procedures provided in the collective bargaining agreement.[11] *See Kohls* v. *NLRB*, 629 F.2d 173, 178 (D.C.Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1390, 67 L.Ed.2d

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[10] The Fifth Circuit reaffirmed this position recently in *Scooba Mfg. Co.* v. *NLRB*, 694 F.2d 82, 84 (5th Cir. 1982).

[11] Wilson's act of contacting and securing a union steward to accompany him when questioning management officials can be considered concerted conduct protected by section 7 of the Act. *See NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975). It is difficult to reason, however, that his objective in contacting the steward—to obtain information on the contents of his personnel file—was "concerted activity" as defined in *Datapoint*, 642 F.2d 123, 128. *See Kohls* v. *NLRB*, 629 F.2d 173, 177 (D.C.Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1390, 67 L.Ed.2d 363 (1981).

363 (1981). Our concern is not with procedure, however, but whether the individual conduct in the instant cases can be termed concerted activities as defined in *Datapoint*. We find that they cannot.

IV. CONCLUSION

We enforce that portion of the Board's order affirming the disciplinary action taken against Bell. We deny enforcement of that portion of the order directing Roadway Express to expunge the warning letters issued to Wilson and Howard.

ENFORCED IN PART, DENIED IN PART.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7831

D.C. Docket No. 10-CA-15158 & 10-CA-15503

ROADWAY EXPRESS, INC., PETITIONER,
CROSS-RESPONDENT,

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
CROSS-PETITIONER.

PETITION FOR REVIEW AND
CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR
RELATIONS BOARD

Before HENDERSON and HATCHETT, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the petition for Roadway Express, Inc. for review of an order of The National Labor Relations Board and on The National Labor Relations Board's cross-application for enforcement of its order, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the said order of The National Labor Relations Board in this cause be, and the same is hereby, DENIED;

It is further ordered that respondent/cross-petitioner pay to petitioner/cross-respondent the costs on appeal to be taxed by the Clerk of this Court.

By: PAM HOLLOWAY
Deputy Clerk

March 17, 1983
ISSUED AS MANDATE: June 1, 1983

APPENDIX C

Roadway Express, Inc. *and* Saint Elmo Bell, Jr. *and* Albert T. Wilson *and* William Jerry Howard Cases 10-CA-15074, 10-CA-15149, 10-CA-15568, 10-CA-15711, 10-CA-15158, and 10-CA-15503

September 8, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 14, 1981, Administrative Law Judge Abraham Frank issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of

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[1]The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

the Administrative Law Judge and hereby orders that the Respondent, Roadway Express, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

ABRAHAM FRANK, Administrative Law Judge: The original charge in this consolidated case was filed on October 1, 1979. Thereafter, additional charges were filed on various dates to and including April 9, 1980. Complaints and orders consolidating the cases issued from November 2, 1979, to and including April 11, 1980. In its final form, the consolidated complaint alleges violations of Section 8(a)(1), (3), and (4) of the Act. The hearing was held from April 23 to April 25, 1980, inclusive, at Atlanta, Georgia. All briefs filed have been considered.[1]

At issue in this case is the question of whether Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights by issuing disciplinary warning letters to several employees. Also at issue is the question of whether Respondent discriminated against an employee by suspending and finally discharging him because of his union and concerted activities and because he filed charges with the Board against Respondent.

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[1] Respondent's motion to reopen the record and to defer to decisions of the Multi-State Grievance Committee with respect to allegations of the complaint that Saint Elmo Bell, Jr., was unlawfully suspended on April 1, 1980, and discharged on April 9, 1980, are denied. Apart from other considerations (See *James Banyard* v. *N.L.R.B.*, 505 F.2d 342 (D.C. Cir. 1974), deferral is inappropriate where, as here, the complaint alleges, in part, that Bell was suspended and discharged because he filed charges with the Board against Respondent.

FINDINGS OF FACT

I. PRELIMINARY FINDINGS AND CONCLUSIONS

Respondent Roadway Express, Inc., a Delaware corporation, with a terminal and office located at Atlanta, Georgia, the only facility involved in this proceeding, is engaged as a common carrier by motor vehicle in interstate transportation of freight. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local Union No. 728, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

A. The Collective-Bargaining Agreement and Respondent's Work Rules

At all times material herein Respondent and the Union have been parties to collective-bargaining contracts covering Respondent's over-the-road and local freight forwarding, pickup, and delivery employees.

Article 16 thereof sets forth the terms and conditions under which employees may refuse to operate Respondent's vehicles, with particular emphasis on the safe operation of such vehicles.

Section 1 provides, *inter alia*, that employees are not required to operate vehicles that are in unsafe operating condition. A refusal by an employee to operate such equipment is not a violation of the contract unless the refusal is unjustified. "All equipment which is refused because not mechanically sound or properly equipped, shall be appropriately tagged so that it cannot be used by other drivers until the maintenance department has adjusted the complaint. After equipment is repaired, the Employer shall place on such equipment an 'OK' in a conspicuous place so the driver can see the same."

Section 2 provides that employees are not to be required or assigned to engage in "any activity involving dangerous conditions of work or danger to persons or property or in violation of any applicable statute or court order, or in violation of a government regulation relating to safety of person or equipment."

Section 4 provides that employees shall immediately, or at the end of their shift, report all defects of equipment.... "The Employer shall not ask any other employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department."

Articles 7 and 8 provide for local area and national grievance machinery to resolve disputes and grievances arising under the contracts and supplements thereto.

Article 45, section 1, of the Southern Area Conference Motor Freight Supplemental Agreement provides, *inter alia*: "Appeal from discharge, suspension or warning notice must be taken within ten (10) regular working days by written notice, and a decision reached within fifteen (15) days from the date of discharge, suspension or warning notice."

It is Respondent's policy to issue warning letters to employees for conduct deemed to be objectionable or contrary to company rules. Two or more such letters for the same offense may result in discharge. Letters remain in an employee's personnel file, but are not considered for disciplinary purposes after 6 months.

An employee who receives a warning letter may file a grievance to protest its issuance. The Union will mail the protest to the Employer, meet with the Company and attempt to have the letter withdrawn. In the event the Company refuses, the protest stands against the letter. No further steps in the grievance procedure are followed unless the warning letter also involves a loss of pay. Where a second letter is issued for the same type of offense an employee may be disciplined up to discharge. If the employee is suspended or discharged, the

entire matter, including the earlier offense, will be considered by the Southern Multi-State Grievance Committee in the final steps of the grievance procedure.

Under rules of the Department of Transportation (DOT), drivers are required to inspect their vehicles before using them. As set forth above, the contracts provide that employees will immediately, or at the conclusion of their shifts, report all defects in equipment.

Pursuant to the terms of the contracts, the Multi-State Grievance Committee, composed of an equal number of representatives from the Union and the Employers, has an agreed-upon procedure to be followed when a driver reports that equipment assigned to him is unsafe to drive. Respondent's posted work rule directs the driver to write up a defective unit on a form provided by Respondent (M-11 for trucks: M-12 for forklifts). The driver delivers the unit to the garage supervisor on duty, usually a garage foreman. The driver may insist that a Class A mechanic inspect the vehicle. If the mechanic, upon inspection, finds that the vehicle is safe and operable, the driver is required to accept the unit and drive it. If he refuses he is subject to discharge.

Respondent has established a corollary work rule. When the driver delivers the unit to the garage foreman, the latter checks out the unit to determine if there is a problem. If he agrees with the driver's report, a mechanic is assigned to repair the unit. If the foreman finds no problem with the unit he so informs the driver. At that point the driver has two options. He can accept the foreman's opinion and continue his trip or he can insist that a mechanic, a member of the Union, inspect the unit. In the event the latter course is followed and the mechanic finds no defect in the unit the driver will receive a warning letter for the delay of the freight and the unnecessary expense incurred by the Company.[2]

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[2] Operations Manager Sasser testified that Respondent and the Union reached verbal agreement at the local level in the fall of 1977 that this procedure would be followed. Robert B.

Each unit is inspected by a mechanic on the Safety Lane before it is ready for dispatch to make sure that it is road worthy. If, as a result of the driver's complaint, a defect is found in the unit, the mechanic who passed the vehicle as safe to operate is given a warning letter for failure to discover the defect before passing it through the Safety Lane. Drivers are paid for downtime in the event the vehicle is found to have a defect. Drivers are not paid for such time if no defect is found.

B. *The Warning Letter to Albert T. Wilson*

Wilson, a dock worker and driver, has been employed by Respondent since 1972. On September 7, 1979, Wilson received a warning letter from Driver Superintendent Al Southern for wasting time, with the comment that he would receive further discipline for any future occurrence of the same nature.

Based upon my observation of the witnesses on the stand and the natural and probable sequence of events,

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Edwards, a road driver for Respondent and a union steward during the 6-month period prior to the hearing, testified that the Union had agreed to a work rule establishing such a policy and posted by Respondent on Respondent's bulletin board. While denying that an actual agreement existed between the Union and Respondent, Assistant Business Agent John G. Honea testified that he was "sure" that a driver who had reported a vehicle to be unsafe would receive a warning letter if a Class A mechanic, upon inspection, found the unit safe and operable. In those circumstances, if the driver protested the warning letter "he wouldn't have a case," but the Union would take his protest and ask the Company to withdraw the letter. In the event a second warning letter for such an offense was issued to a driver with the discipline of suspension or discharge both letters would be considered through the grievance procedure. Resolving credibility, I conclude that the Union was at all times aware of Respondent's working rule as to such warning letters and did not object to the existence of the rule but reserved the right to consider each case on its individual merits in the event the enforcement of the rule resulted in a driver's suspension or discharge.

I find that the letter was issued by Southern in the following context: About a week prior to September 7, Wilson was issued a letter for mishandling freight. The parties agree that the letter was issued by Respondent in error. On September 5, Wilson showed the letter to Assistant Terminal Manager Sammy Harmon and Harmon agreed to investigate it. The next day Wilson again asked Harmon about the letter and whether it had been removed from his file. Harmon said either that he would take care of it or had taken care of it. Wilson thanked Harmon and left the office. However, Wilson was apparently unsatisfied with Harmon's response. The next day Wilson asked Foreman Roy Wood and Terminal Operations Manager William Young for a job steward to check on the disposition of the letter. They told him to find a steward himself. Wilson contacted Steward John Ellis. Together they then went to the City Dispatch Office and asked Southern for permission to see Wilson's personnel file. Southern refused, directing them to continue checking with Harmon. Harmon was not at work that morning, September 7. Wilson and Ellis went to the office of Terminal Manager Carlton Shepherd and asked to see Wilson's file. Shepherd called for Office Manager Jerry Albertson, who was not familiar with the letter. At about that time Southern entered the office and Shepherd told Southern to let Wilson see his file. Wilson, Ellis, and Southern went back to Southern's office where Southern showed Wilson and Ellis a card from Wilson's file with the list of current warning letters. The list did not include the erroneous letter. Wilson was satisfied that the letter had been removed from his file. Shortly thereafter, Southern spoke to Harmon by phone and asked Harmon about Wilson's letter. Harmon said that he had already told Wilson that Harmon had taken care of the letter. Southern went out to the dock and asked Wilson whether Harmon had

said that he had taken care of the letter. Wilson said, "Yes." Southern then issued Wilson the September 7 warning letter on the ground that Wilson had wasted 10-15 minutes of time talking to other management officials after Harmon had said that he had taken care of the erroneous letter.

C. *The Warning Letter to William Jerry Howard*

Howard, a driver, has been employed by Respondent for 3 years. On November 27, 1979, he was issued a warning letter pursuant to Respondent's practice of issuing warning letters to drivers who report defects in vehicles which, upon inspection by a mechanic, are found to have no defects.

Howard was dispatched from Atlanta to Memphis on November 23, 1979. After inspection of the vehicle assigned to him he wrote it up on Respondent's M-11 form, noting that the bottom brake shoe on the tag axle was sticking out from the hub, that the brake shoe was loose, and that air was leaking. He gave the write up to Garage Operations Manager W.E. Hartley. Howard testified that Hartley did not inspect the unit in Howard's presence, but read the writeup and told Howard that he would receive a warning letter for it. However, Hartley, with 14 years' experience as a supervisor of mechanics, foremen, tire people, and garage service employees, testified credibly that he did, in fact, check the unit when he received Howard's writeup. He operated the parking brake valve and found that it did not leak. He saw nothing wrong with the brakes. He then reported to Howard that there was no problem, but if Hartley had to assign a mechanic to inspect the unit Howard would probably receive a warning letter. Howard replied something to the effect that he did not give a damn, that he had a bushel of them.

The mechanic who inspected the unit in accordance with Howard's writeup wrote: "Brake was adjusted and

in place—operates alright—parking brake operation is alright—released."

Both Hartley and Relay Manager Warren Sasser, who supervises the over-the-road drivers at the Atlanta terminal, testified that it was not unusual for truck brakeshoes to protrude somewhat from the edge of the drum, that there would be a little movement of the shoe due to wear. Hartley estimated that out of 10 trucks checked at random 50 percent would show the edges of the shoes on the front side. Sasser testified that 75 percent of the trucks would show one shoe of the four protruding.

D. *The Warning Letters and Discharge of Saint Elmo Bell, Jr.*

Bell, who was employed by Respondent since October 1962, in a variety of transportation duties, exercised his seniority in January 1979, to become a forklift operator at the Atlanta Terminal. Prior thereto he had been employed at Respondent's Conyers terminal. In December 1978, he filed unfair labor practices against Respondent, which resulted in a decision in his favor by an Administrative Law Judge. No exceptions were filed to that decision.[3]

Over the years, in addition to his letter of discharge dated April 9, 1980, Bell has received 55 warning or disciplinary letters, most of them involving charges of tardiness, failure to follow instructions, insubordination, and wasting time. Of these, 21 warning letters were issued in 1979 and 1980. Of the latter, six, dated May 8, 1979, July 26, 1979, August 28, 1979, January 2, 1980, March 4, 1980, and April 1, 1980, are alleged to be unfair labor practices in this proceeding.

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[3] *Roadway Express, Inc.*, JD-858-79, adopted by the Board on January 24, 1980, unpublished.

1. The letter of May 8, 1979

On the morning of the above date, Bell arrived at work and checked out a forklift. After operating it briefly he noted that it was smoking. Bell complained to Dock Foreman Roy Wood, who told Bell to find another lift. Bell said it was not up to him to find a lift and he wanted to see a job steward. Wood told Bell a steward was not available at that time and that Bell should drive his lift until a steward arrived. Bell said he did not care if a steward arrived or not, that he was going to get Wood's ass. Wood determined that Bell had shown disrespect to Wood and wrote up the incident in a warning letter. The letter was thereafter signed by Terminal Operations Manager William Young and presented by Young to Bell. Bell denied using the language attributed to him and asked for the guidelines on insubordination. I credit Wood over Bell. The disputed language is similar to language admittedly used by Bell to Wood on another occasion. Moreover, on May 8, in relation to the same incident of the smoking forklift, Bell spoke rudely to Assistant Terminal Manager David Abercrombie, referring to him as "fat boy." Bell received a second warning letter for his disrespect to Abercrombie. This letter is not alleged to be an unfair labor practice.

2. The letter of July 26, 1979

On the above date at 5:55 a.m., Bell parked his lift next to a stairway leading to a restroom. He signaled Foreman Wood and Wood acknowledged the signal that Bell was taking a head break. Alerted by Young to Young's concern that Bell had been taking excessive head breaks, Wood checked his watch. Bell proceeded to the restroom, returning at 6:27 a.m. While going to and from the restroom Bell talked to several employees and bought a cup of coffee for another employee. He did not recall how long his break lasted, but testified that it

was no longer than other occasions. Breaktime for the employees was at 6:30 a.m.

At 8:25 a.m., Bell was called to Young's office. Steward Long was present. Young told Bell that Bell had taken 32 minutes for a head break, that it had cost the Company $5 and was excessive. Bell asked what the guidelines were for a head break. Young said there were no guidelines, but that he had to start somewhere. Young issued Bell a warning letter for wasting time.

On July 27, 1979, Bell testified in a Board hearing relating to the unfair labor practice charge he had filed against Respondent. Both Wood and Young denied that they had knowledge that Bell had filed an unfair labor practice charge in the Conyers terminal.

3. The letter of August 28, 1979—the refusal to pay overtime

On the above date, Bell was directed by Wood to move some damaged freight that had to be rebanded or "recoopered." This process required the assistance of another employee to physically handle the freight before it could be moved. Bell had not finished this assignment when Wood had another job for Bell at another location. When Bell returned, he was directed to resume the recoopering work with no helper. Under Respondent's work rules, a senior employee, such as Bell, is not required to do less desirable work if a junior man is available. Bell protested the assignment and said that he wanted to see a job steward. However, he got on the forklift and moved some bundles. Wood called the Outbound dock for a steward and found that there would be no steward available until 7 a.m. Informed of this fact, Bell suggested that Wood call a steward at home, but Wood refused to do so. In the course of the conversation, Bell told Wood that Wood thought he was God and Bell was going to show Wood and was going "to put some papers on your ass."

At 9:25 a.m., Bell and Steward Hinson were called to Young's office. Bell was handed three warning letters, one for insubordination to Wood as a result of Bell's above comment to Wood, another for tardiness, and a third for negligence. Young accepted Bell's explanation for being tardy and rescinded that letter. Apparently, the letter for negligence was also rescinded for Bell's record shows only one warning letter dated August 28, 1979. Young told Bell that disrespect to a supervisor was insubordination and presented Bell with a warning letter for that reason. During the course of the conversation Young said that Bell was a fine employee, but his extra-curricular activity was the problem. Bell asked if Young was talking about Bell going to the Labor Board and Young replied, "No. I'm not referring to anything of that nature." Young was aware that Bell was working weekends at other freight lines and believed Bell could have been taking excessive head breaks for that reason. However, Young told Bell that Young did not stay around off the clock to see what activities Bell engaged in.

The grievance conversation lasted until about 9 a.m. At that time Bell told Young that Bell had not yet written up his forklift. Young told Bell to punch in, write up the forklift, and punch out. Bell did as instructed. When Bell reported for work the next morning his timecard had been altered from 8.7 regular hours and .7 overtime to 8 hours only. Bell had been paid overtime for time spent discussing his grievance relating to the May 8 warning letter. Company officials testified that it is company policy not to pay overtime for discussions relating to grievances. Time so spent is only payable during the employee's normal hour shift.

4. The forklift blade controversy

A forklift of the type used at Respondent's Atlanta terminal is an engine powered industrial lift truck designed to move freight by positioning two forks or

blades under the freight and, with the weight of the freight on the blades, elevating the blades and the load for transportation on the dock from one location to another, including trailers. The blades attach to the carriage and can be adjusted by the operator to be closer together or further apart to accommodate different loads and movements. There is a center opening or gallery on the carriage through which the blades are installed. Clips hold the blades to the carriage in notches spaced at regular intervals.

The Atlanta terminal utilizes nine forklifts, eight of them of Datsun manufacture and one of Clark manufacture. Except for one set of Clark blades, the blades are from Datsun. All of the forklifts at the Atlanta terminal, carry an Industrial Truck Association (ITA) Class 2 carriage, handling weights from 2,000 to 5,000 pounds. At least one manufacturer of forklift blades makes blades for both Datson and Clark forklifts. The blades come in different lengths, ranging from 42 inches to 60 inches. However, a Class 2 ITA carriage will accommodate a Class 2 blade. Except for the length, there is no difference between a Class 2 Datsun blade and Class 2 Clark blade. Both Datsun and Clark forklifts are designed to use forklift locking pins. The pins are small bolt like objects, attached to springs. They fit into the blades to prevent them from sliding on the carriage. With or without the pins, bolts or washers bolted or welded to the ends of the carriage prevent the blades from sliding off the carriage. The forklift locking pins permit the operator to adjust the blades without getting off the forklift to move them physically by kicking them into the proper notch.

Respondent's "Forklift Training Manual," issued in January 1980, revised its previous manual by providing in the Operator's Daily Report a column for inspection entitled, "Attachments secured pin in blades." Prior to

the fall of 1979, the forklift operators at the Atlanta terminal drove their lifts without pins.

On September 24, 1979, Bell was operating a forklift without forklift locking pins. A blade came out of its slot and was riding on the carriage over the entry gallery. When Bell attempted to position the blade properly, it slid down and caught his finger between the blade and the carriage, injuring several fingers. Upon his return to work after recuperating from his injury, Bell began writing up forklifts because the blades were not secured in place.

From January 1980 to his discharge in April 1980, Bell continued to write up forklifts because of such problems. On a number of occasions, management officials attempted to persuade Bell that his writeup of the forklifts was unnecessary, that the forklifts were safe to operate despite the fact that the blades would move to some extent when kicked. Bell, however, took the position that the forklift was unsafe to operate if the blade moved at all when the pin was in place. Terminal Operations Manager Al Harrelson explained to Bell that the blades on all the forklifts would slide with no weight on them if kicked at the bottom. The weight of the skids, however, would hold the pins in position and there would be no excessive movement of the blades.

On January 4, 1980, Bell, upon his request, met with Respondent's Safety Supervisor Richard Danford. Bell asked Danford what the Company's policy was with respect to the locking pin on the forklift blade. Danford told Bell that the pins should be in the blades. If some blades did not have pins attached or secured in the blades the operations manager or the dock foreman should allow the operator to change blades or forklifts so that there would be locking pins on the blades. However, if other blades or forklifts were not available, the lift should not be deadlined (removed from service for

repairs) because of the absence of pins, but it should be operated with caution.

5. The letter of January 2, 1980

On the morning of January 2, Bell reported for work and deadlined two forklifts for lack of pins or adequate locking. A third lift could not be started. Dock Foreman Rocky Allen Davis assigned Bell to a fourth forklift, which was being operated by employee Reeves. Reeves was assigned to one of the units deadlined by Bell, which Bell observed. The fourth lift required fuel. Davis accompanied Bell to the fueling area and stood by while Bell fueled the lift. Bell carried on a one-sided conversation during the course of which he told Davis that Davis should not have placed Reeves on the deadlined unit, that Roadway had a history of safety environment, [*sic*] and that Bell could sue management supervisors because they were on profit sharing. Davis told Bell to be quiet. Bell responded that it was just tough shit; he could say anything he wanted to. Davis said that Bell had been disrespectful and would receive a warning letter for insubordination.[4]

6. The letter of March 4, 1980

On the morning of the above date, Bell was assigned a forklift and fueled it for oil. Davis directed Bell to door 112. About 15 minutes later, Davis observed Bell writing up the lift. Bell told Davis that the blades were

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[4] In connection with this incident Bell filed a grievance with the Union on January 11, 1980, alleging that Respondent had failed to follow its own safety procedure by requiring Reeves to operate a forklift that had just been deadlined by Bell. The grievance was settled with the understanding that the Company would not expect another employee to drive an unsafe piece of equipment. However, according to Terminal Manager Carlton Shepherd, he took the position, without objection from the Union, that Respondent did not consider the pins to be an unsafe matter.

insecure, that the pins did not secure the blade adequately. Bell kicked the bottom of the blade and the blade slid over a notch or two. Davis checked the forklift and made sure that the pins would go up and down and lock. Davis told Bell that the blades were safe and operable and he was to report to door 112 with the forklift. Bell refused to drive the lift. Davis called Harmon. In the interim Harrelson appeared and asked what the problem was. Harrelson checked the pin, kicked the blade from the top, and showed Bell the weld bars at the ends which prevented the blades from sliding off the carriage. Harrelson told Bell the lift was safe and instructed Bell to go to door 112. Bell requested a union steward. Davis contacted Steward Carlos Conn. Harmon also checked the forklift and told Bell the unit was safe to operate. Harmon explained to both Bell and Conn that the unit was safe, that the blades would only move if they were kicked at the bottom. They would not move if kicked at the top. When the freight was placed on the forks, the forks would be permanently seated and would not slide back and forth. The pins were merely a convenience for the lift driver. Conn said that he had seen blades slide off the carriage. Harmon agreed that had been possible, but that the metal strips of angle iron prevented accidents of this type. Conn said, "Yes, you're right." Bell, however, was not persuaded that the lift was safe to operate and refused to drive it. The discussions lasted for about 1 hour. Finally, Harmon discharged Bell.

The next day, the forklift was inspected by mechanic Fred W. Piper. Piper told Hartley that the Datsun lift had Clark blades and he would not drive it on the dock. There was considerable wear in the slots that held the blades, and the blades were loose. Piper testified that he did not know whether the dimensions of the Clark blades were different from those of the Datsun blades,

but assumed they were because the parts numbers on the blades were different.

Harmon, Shepherd, and Danford discussed Bell's discharge. In view of Piper's doubts as to the safety of the vehicle and the fact that Bell was an 18-year employee, they decided that his discharge should be reduced to a three-day suspension for wasting time. Bell was notified of the reduced discipline.

Respondent also took steps to investigate thoroughly the issue of the safety of the forklift if operated without pins and the question of the interchangeability of Clark and Datsun blades. On March 5, 1980, representatives from Datsun and Clark came to the terminal. The latter told Shepherd that he would not recommend using a Datsun blade on a Clark lift. The Datsun representative did not know the answer. About a week later, as a result of discussions with higher supervision of the Clark and Datsun organizations, including a design engineer at Datsun, Respondent's officials determined that Class 2 Clark and Datsun blades were interchangeable on a Class 2 carriage and the pins were not a safety item.

7. The letter of April 1, 1980

On the morning of the above date, Bell reported for work and was assigned to the Outbound dock as a senior operator. He checked out the first lift assigned to him and wrote it up as inoperative. Bell was pushed on the first lift to the Inbound dock where he was assigned to lift 3115. Bell reported to Davis that lift 3115 was low on oil and water and the blades were insecure. Bell said there was another lift on the dock and asked Davis why the Company was discriminating against him by choosing a lift for him and not for everyone else. Davis said he was not aware that another lift was available, that Bell could drive that lift if he wanted to or he could put oil and water in unit 3115 and even change the blades, but it was 45 minutes after Bell's starting time and Davis wanted Bell to get on a lift and get back to

Outbound. Bell drove lift 3115 about 100 feet to the third lift, which had no defects. However, instead of driving the latter lift to Outbound, Bell insisted on writing up unit 3115 on the ground that it was his responsibility under the contract and Respondent's manual. Harrelson appeared and joined Davis in instructing Bell to report to Outbound without writing up unit 3115. Harrelson told Bell that Bell had not handled any freight with that unit and if there were any problems with it, the next operator could write it up, that Harrelson would have it checked out. Finally, after about 20 minutes of argument, Bell drove the third lift to Outbound. Bell received a letter of discharge for wasting time.

Subsequently, Shepherd reduced the discharge to a 3-day suspension on the ground that Bell had not actually refused an order. Bell's conduct in wasting time was not so serious an offense to warrant discharge of an 18-year employee.

8. The letter of April 9, 1980

On April 8, mechanic Piper performed a preventive maintenance check on forklift 3102. About 1:12 p.m. he finished his inspection and repair of the unit and signed it as safe to go back into service. He testified that the lift was a Datsun lift with Datsun blades and Clark pins. He parked the lift outside the garage. At 11 p.m. on April 8, Dock Foreman Ricky R. Beasley sent an employee from the Outbound dock to the garage to pick up unit 3102. The employee returned with that unit about 11:30 p.m. Between March 20 and April 7, 1980, unit 3102 had been written up on five occasions. On four of those occasions it had been written up by Bell. On April 7, 1980, the last occasion, Bell had noted that the blades were not of Datsun manufacture.

On April 8, 1980, Bell reported for work at midnight. He was sent to the Outbound dock and assigned by Beasley to unit 3102. Bell immediately wrote up the

lift. Bell testified that the unit was exceptionally clean, with new oil and plenty of coolant, but he noted in his writeup that the pin would not hold the blade; the mast had oil presence; the blades were not of Datsun manufacture, but the unit was a Datsun unit. With respect to the latter problem, Bell testified that the blades came from the Conyers terminal and he "believed" they were obtained from a manufacturer he identified only as "JMP in Lithonia." Bell put the writeup on Beasley's desk. Beasley read it. Beasley told Bell that the lift had just returned from the garage and in Beasley's and the garage's opinion the lift was safe to drive. Beasley instructed Bell to drive the lift. Bell refused on the ground that the lift was not safe to drive. Beasley consulted with Terminal Operations Manager Joe Bass and returned to again order Bell to drive the lift. Bell again refused. Beasley told Bell that if he continued to refuse to drive the lift he would face disciplinary action. Bell requested a union steward and Steward Conn was called to the site. Bell and Conn spoke together for about 6 or 7 minutes. They then entered Bass' office. Bell told Bass that the forklift was unsafe and he would not drive it. Bass discharged Bell.

Immediately thereafter, Bass called Garage Operations Manager Woody Coheley and asked him to bring a mechanic to check out a forklift. About 5 minutes later Coheley appeared with mechanic Donald W. Spears. Spears read Bell's writeup of unit 3102 and checked the unit. He operated the lift and checked the pins. Both pins were locking. The blades were not of Datsun manufacture. They were longer blades and did not have a part number stamped on them. Spears wrote on Bell's writeup: 'no safety defects noted. Inspected April 9, 1980." Spears and Coheley both signed the above statement.

ANALYSIS AND FINAL CONCLUSIONS OF LAW

1. I conclude that Respondent violated Section 8(a)(1) of the Act by issuing a warning letter to Albert

T. Wilson on September 7, 1979, with the threat of further discipline for the same conduct.

It is well settled that an employee attempting to enforce a contract right is engaged in concerted protected activity within the meaning of Section 7 of the Act. *N.L.R.B.* v. *Interboro Contractors, Inc.*, 338 F.2d 495, 500 (2d Cir. 1967); *N.L.R.B.* v. *Ben Pekin Corporation*, 452 F.2d 205, 206 (7th Cir. 1971). As set forth above, article 45, section 1, of the Over-the-Road Supplemental Agreement provides for an appeal of a warning letter within 10 days of its issuance. About a week prior to September 7, 1979, Wilson was mistakenly issued a warning letter for mishandling freight. On several occasions he called the matter to Harmon's attention. Assuming, without deciding, that Harmon said he had taken care of the matter, Wilson was apparently unwilling to take Harmon's word that the erroneous letter had, in fact, been removed from his file. Although the warning letter involved no loss in pay, a second letter for the same offense could result in Wilson's discharge. He was therefore understandably and reasonably anxious to have the matter rectified with certainty. Harmon was not at work on the morning of September 7. Pursuing his meritorious grievance, Wilson asked his foreman for a union steward and was told to find one himself. He found Steward Ellis and together they went to Southern's office. Here the whole matter could have ended with no waste of anyone's time. However, for some inexplicable reason Southern refused to show Wilson his file until ordered to do so by Shepherd. In these circumstances, to discipline Wilson solely for the reason that he continued to pursue a grievance to a final conclusion cannot be defended on the ground that Wilson rather than Southern was wasting Wilson's time and that of other management officials. I find that by such conduct and by threatening

further discipline for the same reason Respondent violated Section 8(a)(1) of the Act.

2. I conclude that Respondent violated Section 8(a)(1) of the Act by issuing a warning letter to William Jerry Howard on November 27, 1979.

An employee who exercises his contractual right to refuse to work under conditions he believes to be unsafe is engaged in protected concerted activity under Section 7 of the Act regardless of the wisdom of his conduct *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9, 16 (1962), citing *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Ben Pekin Corporation, supra; United Stove Co.*, 245 NLRB 1402 (1979); *Modern Carpet Industries Inc.*, 236 NLRB 1014, 1015 (1978), enfd. 611 F.2d 811 (10th Cir. 1979); provided he is honestly and sincerely concerned about his safety *United Parcel Service*, 241 NLRB 1074 (1979); his complaint is not frivolous *Youngstown Sheet and Tube Company*, 235 NLRB 572 (1978); and is for "legitimate union purposes" and "not fabricated for personal motives" *N.L.R.B.* v. *Interboro Contractors Inc., supra;* or "for ulterior motives or as a pretext to achieve objectives unrelated to safety." *Wheeling-Pittsburgh Steel Corporation*, 241 NLRB 1214 (1979), enfd. in part without deciding, in view of the reasonable nature of the employee's refusal to work, whether his protection under Section 7 of the Act requires such a finding 618 F.2d 1009 (3d Cir. 1980).

In the instant case Respondent enforced a working rule against Howard to the effect that a driver who writes up a vehicle as unsafe will receive a warning letter if, upon inspection by a union mechanic, the vehicle is found to be, in fact, safe to operate. As a corollary to this rule, a finding by the inspecting mechanic that the driver was correct and the vehicle is actually unsafe to operate will result in a warning letter to the mechanic on the Safety Lane who had certified the vehicle as

safe. Thus, the driver's inspection, required under DOT, is a double check as to the safety of the vehicle. The driver, however, runs the risk of possible discipline if he insists, as the parties agree he may, that a union mechanic inspect the vehicle the driver claims to be unsafe. If the driver is willing to accept the word of the garage supervisor, generally the garage foreman, that the vehicle is safe to operate the driver can avoid the possibility of receiving a warning letter.

The above working rule is generally known to Respondent's employees, including union stewards. So far as the record shows, the Union has interposed no objection to this rule and there is evidence that it has been tacitly accepted by the Union, except where it results in suspension or discharge.

It is Respondent's position that Howard acted unreasonably in refusing to accept Hartley's word that the vehicle was safe to operate and did not require the expertise of a mechanic to check it out, thereby incurring the expense of a mechanic's time and delay in transportation. I recognize that this is not a case where the employee's good faith is supported by compelling evidence that his complaint was, in fact, meritorious as in, *e.g.*, *Roadway Express, Inc.*, 217 NLRB 278, 280 (1975),[5] enfd. 532 F.2d 751 (4th Cir. 1976); *N.L.R.B.* v. *Inter-*

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[5] Accepting, as the law of the case, the decision of the Court of Appeals for the District of Columbia on remand (*sub nom Banyard* v. *N.L.R.B.*, *supra*), that the Board consider whether the employee's belief in the unsafe condition of his tractor was supported by "ascertainable, objective evidence" as required under the Supreme Court's interpretation of Sec. 502 (*Gateway Coal Company* v. *United Mine Workers of America, et al.*, 414 U.S. 368 (1974). Sec. 502 provides, in relevant part, that the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions of employment shall not be deemed a strike under this Act. The complaint in the instant case does not allege that Howard's conduct was protected under Sec. 502.

boro Contractors, Inc., supra; Wheeling-Pittsburgh Steel Corporation, supra. Indeed, the only evidence as to the unsafe condition of Howard's tractor is the opinion of Howard himself, which is refuted by testimony of Respondent's expert witnesses. Nevertheless, I cannot find, as Respondent urges, that Howard was acting in bad faith and without a sincere concern for his own safety. Howard had been employed by Respondent for 3 years and there is no evidence that he was an otherwise experienced over-the-road driver with additional years of driving and mechanical experience. It has not been shown that he was in the habit of writing up vehicles merely to harass Respondent or to waste his time and that of others. Although Hartley is a supervisor of mechanics, he is not himself a mechanic. It may well be that Howard would have been satisfied if the garage foreman, a mechanic, had inspected the vehicle and assured Howard that it was safe to operate, but that situation, at best, is a narrow distinction and not before me.

I appreciate Respondent's concern that unnecessary writeups are a business expense which must be minimized to the extent possible. The Union, too, is at least aware of Respondent's problem and its efforts to reduce business costs by its policy on writeups. My role, however, is limited to the application of Board and court decisions, which, as set forth above, generally hold that concerted activity under Section 7 of the Act is protected where an employee in good faith refuses to operate equipment he believes to be unsafe, regardless of the merits of his complaint. If, in the interest of balancing an employer's right to conduct his business with optimum results against the right of employees to engage in concerted activity, a new approach is warranted in cases of this type that is an issue to be decided not by me, but by higher authority.

3. I conclude that Respondent did not violate Section (a)(1) of the Act in issuing a warning letter to Saint Elmo Bell, Jr., on May 8, 1979.

The General Counsel argues that Bell's conduct on the above date was protected. I cannot agree. While there are cases where crude, even insolent language of an employee during a grievance-related discussion. (see, e.g., *The Bettcher Manufacturing Corporation*, 76 NLRB 526, 527 (1948); *Socony Mobile Oil Company, Inc.*, 153 NLRB 1244 (1965); *Ryder Truck Lines Inc.*, 239 NLRB 1009 (1978), while not condoned, has been found not so egregious as to deny an employee the protection of Section 7 of the Act, this is not such a case. Bell's disrespectful remark to Wood was not made in the context of a heated discussion of the merits of Bell's grievance and was entirely unprovoked. Wood had attempted to comply with Bell's request for a union steward and told Bell that a steward was not immediately available, that Bell should drive his lift until a steward arrived. Bell's insolent remark that he would get Wood's "ass" followed. Bell's contemptuous attitude toward management was revealed on the same occasion when he called Assistant Terminal Manager Abercrombie "fat boy." For this offense Bell received another warning letter not alleged by the General Counsel to be violative of Section 8(a)(1). Neither letter, in my opinion, interfered with, restrained, or coerced Bell in his right to engage in concerted activity, assuming he was engaged in such activity when he asked to see a steward and Wood replied that none was available at the time.

4. I conclude that Respondent did not violate Section 8(a)(1), (3), and (4) of the Act by the warning letters to Bell of July 26 and August 28, 1979, and in failing to pay Bell overtime for time spent in discussing his grievance.

With respect to the warning letter of July 26, Bell did not deny that he had taken a head break of 32 minutes, suggesting, in fact, that he had spent the same amount of time in the restroom on previous occasions. No evidence was offered by the General Counsel to refute testimony of Respondent's witnesses that a head break of 32 minutes was excessive. An employer is entitled to a full day's work for a full day's pay. The fact that Respondent had no published policy as to excessive time spent in the restroom will not support the charge that the letter of July 26 was issued to Bell for pretextual reasons. Certainly, Respondent's employees were aware that Respondent had a policy against wasting time, whether the time wasted involved loitering on the job or taking excessive head breaks, terminating just before a regular break period. I find that the warning letter of July 26 was issued solely for the stated reason and not as a pretext to interfere with, restrain, or coerce Bell in the exercise of his Section 7 rights.

There is not a scintilla of evidence that Respondent was motivated to discriminate against Bell because of his union membership. So far as the record shows, the relationship between the Union and Respondent is entirely amicable. They are parties to a detailed and extensive labor relations agreement, including a grievance-arbitration procedure to resolve all grievances resulting from infractions of the contract and disciplinary actions. The record is replete with evidence that all and other employees availed themselves of the services of stewards with the full cooperation of management. In these circumstances, there is no basis for concluding that Respondent violated Section 8(a)(3) by the warning letter of July 26.

The only evidence adduced by the General Counsel to support the allegation of a violation of Section 8(a)(4) is the fact that Bell was scheduled to testify at a Board hearing on July 27. This circumstance in and of itself is

hardly a preponderance of evidence proving that Respondent admonished Bell not to spend excessive time in the restroom for the purpose of discriminating against him because he had filed charges and was prepared to give testimony at a Board hearing.

With respect to the warning letter of August 28, I find, essentially for the same reasons, that Bell was properly admonished through a warning letter not to be disrespectful to supervisors. Employees have rights, under the statute, to join unions, to remain union members, and to engage in concerted activity for their mutual aid and protection. Those rights are carefully guarded and protected by the Board and the courts, but they do not give an employee *carte blanche* authority to thumb his nose at his supervisor in flagrant disrespect. In little over a month Bell had told one supervisor that Bell would get his ass or put some papers on his ass and had told a higher management official that he was a fat boy. The sole discipline meted out to Bell for such disrespectful conduct were warning letters. No loss of pay was involved.

I have taken into consideration Young's remark to Bell during a discussion of the above warning letter that Bell's extracurricular activity was the problem. The General Counsel argues that this comment relates to Bell's activity in filing a charge against Respondent in Case 10-CA-14261. Young testified that his remark was based upon his knowledge that Bell worked for another trucking company on weekends and that he told Bell, when the latter asked if the comment related to Bell's going to the Labor Board, that Young was not referring to anything of that nature. I find Young's comment about Bell's extracurricular activity ambiguous. In the absence of additional probative evidence, I find it insufficient to support a conclusion that the warning letter was issued to Bell for pretextual reasons in violation of the Act.

With respect to the allegation of the complaint that Bell was discriminatorily denied overtime pay for time spent discussing his grievance after working hours, unrefuted testimony of Respondent's witnesses is that it was not the policy of Respondent to pay employees for time spent discussing a grievance beyond the regular 8-hour shift. The fact that Bell may have been paid such overtime on a previous occasion does not prove a contrary practice or warrant a finding that Respondent violated the Act by failing to pay Bell overtime on August 28.

5. I conclude that Respondent did not violate Section 8(a)(1) and (4) of the Act by issuing a warning letter to Bell on January 2, 1980.

My reasons for dismissing the 8(a)(1) and (4) allegations of the complaint relating to the warning letter of August 28, 1979, are equally applicable to the warning letter of January 2, 1980. Bell's arrogant remark to Davis, when the latter asked Bell to cease a one-sided, rambling conversation, that it was "tough shit" and Bell could say anything he wanted to was not in the context of concerted activity and did not relate to Bell's prior concerted activity. In view of Bell's pattern of engaging in disrespectful conduct toward his supervisors, it was a proper admonishment and not a pretext to punish Bell for his concerted activity or because he had filed charges and testified at a Board hearing.

6. I conclude that Respondent did not violate Section 8(a)(1) and (4) of the Act by suspending Bell on March 4, 1980, and on April 1, 1980, and finally discharging him on April 9, 1980.

With respect to the allegation that Bell was suspended and finally discharged because he filed charges with the Board and gave testimony at a Board hearing, I find, for reasons set forth above relating to the warning letter of July 26, 1979, that the evidence is insufficient to support a violation of Section 8(a)(4).

The incident of April 1, resulting in Bell's discharge, subsequently converted to a 3-day suspension, did not involve a question of safety. He had decided, at this option, not to operate unit 3115 and had driven it a short distance to reach a third, operable unit. Davis and Harrelson were aware of the defects in unit 3115 and had accepted responsibility for it. At that point, Bell's responsibility for the unit ended. As an employee, he was not required to police Respondent's compliance with the contract. He was needed urgently at the Outbound dock. Another question would be presented if this was simply a situation where an employee asserted for the first time, even mistakenly, a debatable contract right. But Bell's conduct does not fall into that category. He searched out the cracks and crevices in Respondent's working rules to support clearly indefensible positions. Disciplined for insubordination, he argued that Respondent had no posted policy on insubordination. Similarly, he contended that he should not be warned about wasting time in the restroom because there was no posted policy for such an offense. At some point an employer need not put up with lawyering of this type. The mere assertion of a contract right does not protect otherwise unprotected conduct. Bell's insistence on April 1 that it was necessary for him to write up a forklift he had not operated and was not scheduled to operate was not an exercise of his Section 7 rights. It fits the pattern he had established of noncooperation and resistance to the instructions of his supervisors. I find he was lawfully disciplined on that occasion.

The allegation of the complaint that Respondent violated Section 8(a)(1) of the Act by suspending and finally discharging Bell as a consequence of the controversy over the safety of the forklifts assigned to him is a more serious and difficult issue. Paragraph 2 of this section sets forth the relevant Board and court decisions upon which my conclusions as to this issue must

be and are based. The controlling rule of those decisions, particularly Board decisions, which I am required to follow, is that Bell was engaged in protected concerted activity if he in good faith with concern for his own safety and without ulterior motives unrelated to safety refused to operate forklifts assigned to him on the above dates.

After a careful study of the record and based upon my observation of Bell and other witnesses as they appeared before me, I conclude that Bell was not in good faith and was not solely concerned for his own safety when he challenged the safety of the forklifts he was assigned to operate.

Bell's employment history shows that he exhibited a disrespectful and insolent attitude toward his immediate supervisors and higher management officials, threatening Wood and Davis to get their "ass" and calling Abercrombie derisively "fat boy." He was particularly resentful of Davis, testifying that Davis acted aggressively on the ground that Davis, a large man, walked next to Bell and looked down on him. Yet there is no evidence that Davis did or said anything to Bell of an aggressive nature. Bell told Wood that Wood thought he was "God" and that Bell was going to show Wood and have some papers for his ass.

I cannot agree with the General Counsel that the 21 warning letters issued to Bell in 1979 and 1980 were largely pretextual resulting from the fact that Bell had filed charges against Respondent in the fall of 1978 and in 1979. Only six of those letters are alleged by the General Counsel to be unlawful and of those I have hereinabove found three to be proper, lawful warnings and a fourth to be proper discipline. Although Bell had received more than two warnings for the same offense within a 6-month period and, under Respondent's work rules, could have been discharged in 1979, Respondent took no strong action against Bell until March 1980.

Even then Shepherd reduced the discharges of March 4, 1980, and April 1, 1980, to 3-day suspensions in consideration of the nature of the incidents and the fact that Bell was an 18-year employee.

Bell's concern about the safety of the forklifts began after the injury to his fingers on September 24, 1979. It is entirely understandable that an employee injured on the job would have a heightened awareness of the possibility of future injuries. In view, however, of Bell's conduct prior to that date and his uncompromising and uncooperative attitude in the months that followed. I cannot find that he ws in good faith when he wrote up forklift after forklift, subsequently found by Respondent's union mechanics to be safe to operate.

A forklift, of course, is a hazardous piece of equipment and must be operated with extreme care under the most favorable conditions. With or without pins, the blades can slide together if they are at an angle when moving freight in or out of a trailer. Testimony of witnesses for Respondent, including its mechanics, is that the pins were for the convenience of the operator and were not in and of themselves safety matter. Obviously, too, forklifts are subject to a certain amount of normal wear and tear. The blades in a used forklift will not fit as tightly and snugly as those in a new one. These are all matters that must be taken into consideration by the operator of a forklift and the mechanics who inspect such equipment at regular intervals. This was explained to Bell, himself an experienced forklift operator, by Respondent's supervisors and mechanics.

No amount of explanation was enough to persuade Bell to cease writing up forklifts unnecessarily. He became something of an *enfant terrible* on the Atlanta dock, holding his supervisor's feet to the fire by challenging the safety of forklifts on every possible occasion. Between October 25 and December 19, 1979, he wrote up as inoperable the same forklift on four differ-

ent occasions. On each occasion, the forklift was found safe and operable by Shop Foreman Mecca and mechanic Wright. He found other reasons to write up forklifts and delay the handling of freight. On six occasions between January 1 and 18, 1980, Bell noted on his writeups that the intercom was too loud. Forklifts do not carry intercoms. On one occasion Bell left the date and the number of the forklift blank on his writeup, complaining that he could not see the number on the unit in the dark at the shop area. Yet the shop area is illuminated with mercury vapor lights and a photograph of the unit shows its number clearly.

I have taken into consideration the fact that mechanic Piper had expressed concern that the Datsun forklift Bell refused to operate on March 4, 1980, was fitted with Clark blades and Piper was not sure at that time that the blades were of the proper dimension. However, this was not a matter raised by Bell as a safety issue on that date and does not relate to his good faith in challenging the safety of the forklift. Subsequently, as set forth above, Respondent investigated the issue and determined that Class 2 blades were interchangeable on a Class 2 carriage. Moreover, at least one manufacturer manufactures blades for both the Datsun and Clark forklifts.

The forklift Bell refused to operate on April 9 had just been inspected and released by the shop and Bell was so informed. It was certified by a mechanic immediately after he refused to operate it as safe and operable.

On the basis of the foregoing, I shall recommend that the allegations of the complaint as they relate to Bell be dismissed.

The unfair labor practices found above are unfair labor practices within the meaning of Section 2(2), (6), and (7) of the Act.

ORDER[6]

The The Respondent, Roadway Express, Inc., Atlanta, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing employees in the exercise of their Section 7 rights by issuing warning letters to employees because they have pursued a grievance to a final conclusion and threatening employees with further discipline for the same conduct.

(b) Interfering with, restraining, and coercing employees in the exercise of their Section 7 rights by issuing warning letters to employees because they have in good faith refused to operate a vehicle they believe to be unsafe.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind and expunge from the personnel record of Albert T. Wilson the warning letter issued to him on September 7, 1979.

(b) Rescind and expunge from the personnel record of William Jerry Howard the warning letter issued to him on November 27, 1979.,

(c) Post at its terminal in Atlanta, Georgia, copies of the attached notice marked "Appendix."[7] Copies of said

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[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall

notice, on forms provided by the Regional Director for Region 10, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notice is not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent violated the Act by issuing warning letters to Saint Elmo Bell, Jr., on May 8, July 26, and August 28, 1979, and January 2, 1980; by suspending Bell on March 4 and April 1, 1980; by discharging Bell on April 9, 1980; by denying Bell overtime pay for the time spent discussing a grievance; and insofar as the complaint alleges violations of the Act other than those specifically found herein.

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read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interfere with, restrain, and coerce our employees in the exercise of their Section 7 rights by issuing warning letters to employees because they have pursued a grievance to a final conclusion and we will not threaten employees with discipline for the same conduct.

WE WILL NOT interfere with, restrain, and coerce our employees in the exercise of their Section 7 rights by issuing warning letters to employees because they have in good faith refused to operate a vehicle they believed to be unsafe.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind and expunge from the personnel record of Albert T. Wilson the warning letter issued to him on September 7, 1979.

WE WILL rescind and expunge from the personnel record of William Jerry Howard the warning letter issued to him on November 27, 1979.

ROADWAY EXPRESS, INC.

Office Supreme Court, U.S.
FILED
SEP 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2061

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROADWAY EXPRESS, INC., RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent,
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RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Respondent Roadway Express, Inc.,[1] respectfully requests that this Court deny the National Labor Relations Board's

[1] Respondent Roadway Express, Inc., a Delaware corporation, is a wholly-owned subsidiary of Roadway Services, Inc., as are Roadway Express, Inc. of Nevada, Roadway Express, Inc. of Arizona, Reader Properties, Inc., Carrier Supply, Inc., Roadway Service (Canada, Ltd.) and Roadway Express, Ltd.

Petition for a Writ of Certiorari in this case seeking review of the Judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 17, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals (Petition, App. A, 1a-16a) is reported at 700 F.2d 687. The decision and order of the National Labor Relations Board (Petition, App. C, 19a-52a) are reported at 257 N.L.R.B. 1197.

JURISDICTION

The jurisdictional requisites are correctly summarized in the Petition. Respondent does not question the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Rela-

tions Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), provides in pertinent part:

> It shall be an unfair labor practice for an employer
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title . . . .

COUNTERSTATEMENT OF THE CASE

Respondent makes the following additions or clarifications to Petitioner's statement of the factual and procedural background of this case.

1. In early September, 1979, Albert T. Wilson received a warning letter for mishandling freight. (Petition, App.A 2a). On September 5, 1979, Wilson showed the letter to assistant terminal manager Sammy Harmon and asked him to investigate why it had been issued. The following day, Harmon advised Wilson that the warning letter had been removed from his file. (Petition, App.C, 25a).

Two days later, Wilson and a union steward contacted driver superintendent Al Southern and asked about the warning letter and whether it had been removed from the file. When Southern indicated he knew nothing about such a letter, Wilson advised him that he had previously discussed it with Harmon. Because of this Southern instructed Wilson to discuss the matter with Harmon. (Petition, App.C, 25a).

Instead of obeying the instruction that he wait until Harmon came into work that day to confirm that the matter had been resolved, Wilson proceeded to take his inquiries to the terminal manager and the office manager. Being unaware of Southern's instructions to Wilson, they took the time to determine that the letter had been removed as Harmon had told Wilson it was. After Wilson disobeyed his directive, Southern contacted Harmon and asked him about the warning letter. Harmon stated that he had already told Wilson that the letter was erroneously issued and that he had removed it from the file. Southern then contacted Wilson and asked him if Harmon had told him he had taken care of the letter. Wilson said that Harmon had told him this. As a consequence, Southern gave Wilson a warning letter for wasting time, as Wilson had

disregarded his instructions to handle the matter with Harmon and as a result had wasted working time and unnecessarily taken up the time of other management officials. (Petition, App.C, 252-26a).

2. William J. Howard had been an over-the-road driver for Respondent for over three years when he was assigned to drive a truck from Atlanta to Memphis on November 23, 1979. Prior to being assigned the truck, it was inspected in the safety lane by a mechanic and placed on the ready line. Howard also inspected the truck before departing and noticed that the brake shoe on one wheel protruded approximately one quarter of an inch past the edge of the hub. When Howard grabbed the brake shoe, he was able to move it slightly in the hub. Additionally, Howard asserted that air leaked from the

valve inside the cab for a brief period when he set the parking brake. (Petition, App.C, 26a).

Howard reported this to garage operations manager W. E. Hartley, who read the write-up Howard had given him and proceeded to inspect the truck. He found everything in proper working order and advised Howard of his findings. Howard said he wanted a third mechanic's opinion. Hartley advised Howard that if he wanted to have another mechanic check out the truck he was sure that Howard's supervisors would give him a warning letter for delaying freight because the mechanic would find nothing wrong with the truck. Howard asked that a mechanic look at the truck and the mechanic found nothing wrong with it. (Petition, App.C,

26a).

The warning letter that Howard received was issued to him pursuant to a work rule that had been agreed upon by Respondent and the Union to remedy the problem of delayed freight occasioned by groundless requests for multiple truck inspections. Pursuant to this rule, if after the safety lane pretrip inspection by a mechanic, a driver believes there is a problem with his truck, he reports it to the garage supervisor. If the supervisor agrees with the driver, a mechanic is assigned to repair the truck. If the supervisor finds no problem with the truck, it is released and the driver is instructed to commence his trip. If the driver then insists that a union mechanic inspect the truck, that inspection will be made with the understanding that the work rule provides that in the event the mechanic

inspecting the truck finds no problem, the driver is given a warning letter for delaying freight. If the mechanic finds a defect in the unit, the safety lane mechanic who originally certified the truck as ready is given a warning letter. (Petition, App.C, 23a-24a).

In both of these cases the NLRB issued complaints asserting that the issuance of the warning letters violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), on the theory that the employees were disciplined for asserting rights under a labor contract. The Eleventh Circuit ruled that the employees' actions were not concerted under Section 7 of the Act, 29 U.S.C. § 157, and, therefore, the NLRB did not have jurisdiction over the cases.

REASONS FOR DENYING THE PETITION

Two matters were at stake in the underlying unfair labor practice proceedings. The most obvious was the propriety of the warning letters issued to Wilson and Howard. The other matter was the legal propriety of what is referred to as the Interboro doctrine,[2] i.e., is individual activity by an employee that is not directed at, or in preparation for, group action "concerted" activity within the purview of the NLRB's jurisdiction.

When the case reached the Court of Appeals, for all practical purposes the only viable issue was whether the Board's Interboro doctrine was a proper interpretation of the law as the warning notices

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[2] Interboro Contractors, Inc., 157 N.L.R.B. 1295 (1966), enf'd, 388 F.2d 495 (2d Cir. 1967) (an individual employee's attempt to enforce the provisions of a collective bargaining agreement may be deemed to be concerted activity under Section 7 of the Act).

issued were no longer in effect, since more than six months had passed from the date of their issuance. Under Article 45, Section 1 of the collective bargaining agreement (GCX 4), the warning letters expire six months after being issued.

It is apparent that the only reason the Board seeks certiorari in this case is the fact that the Court has granted the Board's petition in NLRB v. City Disposal Systems, Inc., Case No. 82-960. Because of this occurrence, the Board wants to seek a reversal of the ultimate issue before the Eleventh Circuit if this Court rules in its favor in City Disposal.

The question that is presented by all this is what is to be gained by granting the Board's petition for certiorari in this case? The two employees who were issued warning letters have lost any need

to have them revoked as they are no longer in effect. Because of this, the case now involves a simple battle over the legal principle found in the Interboro doctrine. There is no need, however, for this battle to continue between Respondent and Petitioner in this case. It is quite clear to all concerned that the decision of this Court in City Disposal Systems, Inc., supra, concerning the propriety of the Interboro doctrine will be the law in the Eleventh Circuit. Thus, the Court's resolution of City Disposal Systems, Inc. will resolve the dispute over the decision of the Court of Appeals for the Eleventh Circuit in the instant case.

Recognizing the importance of the Court's decision in City Disposal Systems, Inc., Respondent has filed a brief as amicus curiae on behalf of the Respon-

dent in that case. Thus, whatever battle that remains to be fought over the Interboro doctrine can be left to that case. There is no need to continue the litigation of the instant case.

CONCLUSION

The Board's Petition for a Writ of Certiorari should be denied.

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